No. 10,473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BYRON JACKSON CO., a corporation,
Appellant,

vs.

PATTERSON-BALLAGH CORPORATION, a corporation, J. C. BALLAGH and D. G. MILLER,
Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS FOR JURISDICTION.

The pleadings involved in the case at bar consist of plaintiff's complaint (R., 2), defendants' motion to dismiss the complaint (R., 15) defendants' answer (R., 17) and defendants' amendment to the answer (R., 29).

The action was brought by plaintiff in the United States District Court for the Southern District of California, Central Division. The plaintiff was a corporation of the State of Delaware and a citizen and resident of that state. The defendants were all citizens and residents of the Central Division of the Southern District of California, the defendant Patterson-

Ballagh Corporation being a corporation organized and existing under the laws of the State of California. The action involved a sum or value in excess of Three Thousand Dollars ($3,000) exclusive of interest and costs (R., 9; 60). Jurisdiction of such action was vested in the United States District Court by Section 24(1) of the Judicial Code (U.S.C.A., Title 28, Sec. 41(1)).

This proceeding being an appeal from the final decision of the United States District Court in said matter (R., 84), jurisdiction is vested in this honorable United States Circuit Court of Appeals for the Ninth Circuit by Section 128(a) of the Judicial Code (U.S.C.A., Title 28, Sec. 225, Subd. (a)).

CONCISE STATEMENT OF THE CASE.

This case was tried before Mr. Judge Dave W. Ling without a jury. He decided in favor of the defendants. No opinion was written.

The action was commenced to enforce secondary rights on the part of the plaintiff as a minority stockholder in Patterson-Ballagh Corporation (hereinafter sometimes called the "Corporation"), because the Corporation refused to enforce such rights against Ballagh and Miller who were the majority stockholders and to whom plaintiff claimed the Corporation had been paying (during the years 1939, 1940 and 1941) excessive salaries (R. 2). Although the Corporation is named as a defendant, the action is one

for and on behalf of the Corporation and, therefore, the term "defendants" as hereinafter used is intended only to include the defendants Ballagh and Miller.

The Corporation was organized in September of 1928 to take over the business of a theretofore existing partnership in which the defendant Ballagh and one C. L. Patterson were the sole partners (R., 61; 476; 477). That partnership had been engaged in the manufacture and sale of so-called "casing protectors" which were claimed to be patented and which were used in the drilling of oil wells.[1] The Corporation, after its formation, engaged in the manufacture and sale of products for use in the drilling of oil wells and very largely in the manufacture and sale of casing protectors as theretofore manufactured by the partnership or as slightly modified.

At the time of the formation of the Corporation there were issued 1,000 shares of its capital stock, which have ever since remained outstanding. No additional shares have ever been issued. Ballagh became the owner of 500 of said shares and Patterson became the owner of the remaining 500 thereof (R., 61).

Shortly after the formation of the Corporation and on or about September 20, 1928, the plaintiff, the Cor-

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[1]A casing protector was a simple device and was defined by Ballagh as follows: "A casing protector is a continuous ring of rubber which has an inside diameter smaller than the inside diameter of the drill pipe on which it is to operate. It is forced over the drill pipe and fuses itself upon the drill pipe by the resilience of the rubber, and in that position has a diameter that is larger than that of the tool joint, and acts as a bearing medium to prevent the wearing or whipping of the tool joint against the casing." (R., 343.)

poration, Ballagh and Patterson entered into certain agreements which were introduced in evidence as Exhibits 15a, 15b, 15c, and 15d (R., 307-330). Under these agreements the Corporation was to pay to plaintiff certain royalties on casing protectors. Furthermore, under these agreements plaintiff was to purchase from Ballagh 125 shares of the stock of the Corporation and also from Patterson 125 shares of the stock of the Corporation. These purchases were made and, since September 20, 1928, the plaintiff has been the owner of 250 shares (R., 331-332; 340; 410). Ballagh continued to be the owner of 375 shares, except that in August of 1931 he conveyed 250 of his shares to a company in which he and his wife were the sole stockholders and which company thereafter continued to be the holder of said shares. Patterson continued to be the owner of 375 shares until February of 1939, at which time the defendant Miller became the beneficial owner of all of the Patterson stock (R., 61; 331-332; 340). Thus, during the period material to the present suit Ballagh was the beneficial owner of 375 shares, Miller the beneficial owner of 375 shares, and the plaintiff the owner of 250 shares.

At the time that Miller acquired the Patterson shares, or shortly thereafter, the Board of Directors of the Corporation was revamped, in a manner dictated by Ballagh and Miller, and thereafter consisted of Ballagh, Miller, one Howard Burrell (who about that time and by the selection of the defendants became the attorney for the Corporation (R., 429-430)), one H. C. Armington (an employee of the Corpora-

tion), and E. S. Dulin, plaintiff's president[2] (R., 352-354). Miller, in place of Patterson, became the President and General Manager (R., 62; 373) and Ballagh continued as Secretary and Treasurer and Sales Manager (R., 62; 483). According to the minutes which appear in evidence as Exhibit 1 (R., 206-267), the defendants were employed only in the capacities above stated. They were not employed as research men or inventors.

The new Board was dominated by Ballagh and Miller. These gentlemen dictated the policies of the Corporation (R., 354; 381; 399).

The new Board, over the objection of plaintiff as represented by Dulin, and almost immediately after its formation, did three things of importance: (1) it repudiated all obligation to pay plaintiff royalties under Exhibits 15a, 15b, 15c, and 15d (R., 222; 229; 336; 359; 382); (2) although dividends had theretofore been paid, and often in large amounts, it refused to pay any further dividends (R., 68; 245; 255; 284; 382); and (3) it made marked increases in the salaries of Ballagh and Miller, on account of which salaries the present action is being maintained.

For the calendar year 1939 Ballagh received as salary $15,000; for the calendar year 1940, $30,166.66; and for the part of the calendar year 1941 prior to the commencement of the present suit, which was September 10, 1941, $19,000 (R., 64). For the calendar year 1940 Miller received $19,750, and for such part of the

[2]Dulin could not be dislodged; there was cumulative voting.

calendar year 1941 prior to the commencement of this suit $12,000 (R., 66).[3]

Plaintiff claimed and does now claim that $12,000 per annum to each of the defendants was the outside, and the extreme outside, limit that the defendants by any stretch of the imagination could have justified as salaries. Plaintiff claimed and now claims that the defendants should reimburse the Corporation on account of excessive salaries paid prior to the commencement of the above entitled action in at least the sum of $41,416.66, together with interest.

Although the defendants in the trial court did not expressly concede that they were forced to resort to their claimed services as inventors in order to justify the amounts of their salaries, they did in several ways impliedly make such a concession.

The plaintiff in its complaint charged that defendants' salaries were excessive and that the Corporation was entitled to recover $41,416.66. The allegations that defendants' salaries were excessive were denied by the defendants in their answer. Thus the excessiveness of the salaries was put in issue.

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[3]The above salary figures were taken from the findings of the Court. These figures are for 1941 higher than the figures set forth in the complaint. They also vary from the figures for the Corporation's fiscal years which ended upon November 30. According to the Corporation's statements (Ex. 6) the following salaries were paid: For the fiscal year ending November 30, 1939, Ballagh received $15,500; for the fiscal year 1940—$29,166.66, and for the fiscal year 1941, up to September 10 of that year, $21,000. For the fiscal year 1940 Miller received $19,252, and for the fiscal year 1941, up to September 10, $13,500. For the entire fiscal year 1941 Ballagh and Miller together received $53,667 (R., 277-283) (Ex. 18D).

In their amendment to their answer, defendants set forth as an affirmative defense that plaintiff by its actions at stockholders' and directors' meetings had waived any claim as to the excessiveness of the salaries. Thus the question of waiver was put in issue.

The questions involved in this appeal are, therefore,

(a) Were the salaries of Ballagh and Miller excessive?

and

(b) Did the plaintiff waive its right to so claim?

SPECIFICATIONS OF ERROR RELIED UPON BY APPELLANT, AND THE REASONS WHY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ALLEGED TO BE ERRONEOUS.

1. The District Court erred in not finding that the persons who were and had been directors of defendant Patterson-Ballagh Corporation since February 15, 1939, (other than the defendant Ballagh, the defendant Miller, and E. S. Dulin) in fact were selected by and were in fact representatives of the said Ballagh and the said Miller upon the said Board. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

2. The District Court erred in not finding that the said Ballagh and the said Miller ever since February 15, 1939, dominated, controlled, and directed each and every of the acts and doings of said Patterson-Ballagh Corporation. There was substantial and ample evi-

dence to support such a finding and there was no evidence to the contrary.

3. The District Court erred in finding that since February 15, 1939, the said Ballagh and the said Miller, pursuant to or subject to the instructions, advice, supervision or direction of the Board of Directors of said Patterson-Ballagh Corporation, directed the affairs of said Patterson-Ballagh Corporation or carried on its business. There was no evidence to support this finding. The evidence was to the contrary.

4. The District Court erred in finding that said Ballagh and said Miller, or either thereof, have discharged their duties as such officers faithfully, efficiently, or conscientiously or loyally or meritoriously as to the payment of salaries and/or remuneration to themselves. There was no evidence to support this finding. The evidence was to the contrary.

5. The District Court erred in not finding that the said Ballagh and the said Miller at all times since February 15, 1939, fraudulently and unlawfully connived, cooperated, schemed, and conspired in directing the affairs of said Patterson-Ballagh Corporation for their own ends (as distinguished from the well-being of said corporation and the interests of plaintiff as a minority stockholder), and for their own profit. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

6. The District Court erred in not finding that the said Ballagh and the said Miller declared and paid to the said Ballagh grossly excessive salaries and com-

pensation for services rendered by the said Ballagh to said Patterson-Ballagh Corporation. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

7. The District Court erred in not finding that the salary and compensation paid to the said Ballagh for the calendar year 1939 was grossly excessive in at least the amount of $3,000. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

8. The District Court erred in not findilng that the salary and compensation paid to the said Ballagh for the calendar year 1940 was grossly excessive in at least the amount of $18,166.66. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

9. The District Court erred in not finding that the salary and compensation paid to the said Ballagh for that part of the calendar year 1941 up to the time of the commencement of this action was grossly excessive in at least the amount of $9,000. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

10. The District Court erred in not finding that the payment of the salaries to the said Ballagh and for the calendar years 1939, 1940, and 1941 was made as a part of a scheme and conspiracy to defraud, entered into by the said Ballagh and the said Miller. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

11. The District Court erred in finding that the services rendered by the said Ballagh to Patterson-Ballagh Corporation from January 1, 1939 to the time of filing suit on September 10, 1941, were and/or are now and/or will continue to be of very great value to Patterson-Ballagh Corporation. There was no evidence to support this finding. The evidence was to the contrary.

12. The District Court erred in finding that the services of the said Ballagh were performed loyally, efficiently, carefully or effectively, as to the payment of salaries and/or remuneration to the said Ballagh and/or the said Miller. There was no evidence to support this finding. The evidence was to the contrary.

13. The District Court erred in finding that the compensation paid to the said Ballagh for the periods set forth in paragraphs 7, 8, and 9 hereof was fair, just, or reasonable at the various times it was authorized or approved or paid. There was no evidence to support this finding. The evidence was to the contrary.

14. The District Court erred in not finding that, by prior arrangement between the said Ballagh and the said Miller, the said Miller voted in favor of the said Ballagh upon all resolutions concerning the compensation of the said Ballagh. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

15. The District Court erred in finding that any resolution concerning the compensation of the said Ballagh was approved in good faith and/or by an independent and/or disinterested majority of the directors present at such meeting. There was no evidence to support this finding. The evidence was to the contrary.

16. The District Court erred in not finding that the compensation paid to the said Ballagh during the calendar year 1939 was approved and ratified at the annual meeting of the shareholders on January 16, 1940 only over and against the protest and objection of the plaintiff herein. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

17. The District Court erred in not finding that the compensation paid to the said Ballagh during the calendar year 1940 was approved and ratified at the annual meeting of the shareholders on January 21, 1941 only over and against the objection and protest of the plaintiff herein. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

18. The District Court erred in not finding that the compensation paid to the said Ballagh from January 1, 1941 to September 10, 1941 was approved and ratified at the annual meeting of the shareholders on January 20, 1942 only over and against the objection and protest of the plaintiff herein. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

19. The District Court erred in finding that the resolutions of stockholders, or any thereof, mentioned in paragraphs 16, 17, and 18 hereof, were regularly and/or legally adopted or adopted in good faith and/or without fraud by each and all, or any, of the stockholders voting for the same. There was no evidence to support this finding. The evidence was to the contrary.

20. The District Court erred in not finding that the payment of the salaries to the said Miller and for the calendar year 1940 and for the calendar year 1941 prior to the time of the commencement of this suit was made as a part of a scheme and conspiracy to defraud, entered into by the said Ballagh and the said Miller. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

21. The District Court erred in not finding that the sum of $19,750 paid to the said Miller for the calendar year 1940 was grossly excessive in at least the sum of $7750. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

22. The District Court erred in not finding that the sum of $12,000 paid to the said Miller for that part of the calendar year of 1941 prior to the time of the commencement of this action was grossly excessive in at least the sum of $5000. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

23. The District Court erred in finding that the resolutions adopted by the Board of Directors of Patterson-Ballagh Corporation fixing compensation of the said Miller for services rendered by him to Patterson-Ballagh Corporation were duly, regularly and/or legally adopted by the Board of Directors of said corporation. There was no evidence to support this finding. The evidence was to the contrary.

24. The District Court erred in finding that the services rendered by the said Miller to the Patterson-Ballagh Corporation from January 1, 1940 to the time of filing this action were and/or now are and/or will continue to be of substantial value to Patterson-Ballagh Corporation. There was no evidence to support this finding. The evidence was to the contrary.

25. The District Court erred in finding that such services referred to in paragraph 24 hereof were performed loyally, efficiently, carefully, or effectively. There was no evidence to support this finding. The evidence was to the contrary.

26. The District Court erred in finding that the compensation paid to the said Miller during the periods mentioned in paragraphs 21 and 22 hereof was fair, just, or reasonable as to Patterson-Ballagh Corporation at the various times it was authorized or approved or paid. There was no evidence to support this finding. The evidence was to the contrary.

27. The District Court erred in not finding that, by prior arrangement between the said Ballagh and the said Miller, the said Ballagh voted in favor of the said Miller upon all resolutions concerning the com-

pensation of the said Miller. There was substantial and ample evidence to support such a findilng and there was no evidence to the contrary.

28. The District Court erred in finding that the resolutions, or any thereof, fixing the compensation of the said Miller were approved in good faith or by an independent or disinterested majority of the directors present at such meetings. There was no evidence to support this finding. The evidence was to the contrary.

29. The District Court erred in not finding that the compensation paid to the said Miller during the calendar year 1940 was approved and ratified at the annual meeting of the shareholders on January 21, 1941, only over and against the objection and protest of the plaintiff herein. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

30. The District Court erred in not finding that the compensation paid to the said Miller from January 1, 1941 to September 10, 1941, was approved and ratified at the annual meeting of the shareholders on January 20, 1942, only over and against the objection and protest of the plaintiff herein. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

31. The District Court erred in finding that the resolutions of stockholders or any part thereof mentioned in paragraphs 29 and 30 hereof were regularly and/or legally adopted or adopted in good faith and/or without fraud by each and all or any of the stock-

holders voting for the same. There was no evidence to support this finding. The evidence was to the contrary.

32. The District Court erred in not finding that the amount of the salaries and compensation of the said Ballagh and the said Miller were fixed with the purpose and intent of depriving the plaintiff of dividends accruing or to accrue to plaintiff from the said Patterson-Ballagh Corporation. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

33. The District Court erred in not finding that, if said excessive salaries and compensation had not been paid to the said Ballagh and the said Miller, such excess would have been available for the payment of dividends to the stockholders of Patterson-Ballagh Corporation, including the plaintiff. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

34. The District Court erred in not finding that the amount of the salaries and compensation to the said Ballagh and the said Miller were neither fairly nor honestly determined by the said Ballagh and the said Miller. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

35. The District Court erred in not finding that for and on account of the payment of excessive salaries and compensation the defendants Ballagh and Miller are indebted to said Patterson-Ballagh Corporation in at least the sum of $41,416.66, no part of

which has been repaid by the said Ballagh and the said Miller, or either thereof, to the said corporation. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

36. The District Court erred in not finding that plaintiff failed to obtain any action by the directors or the stockholders of Patterson-Ballagh Corporation due to the domination, control, and direction of said corporation by the said Ballagh and the said Miller, and due to a scheme and conspiracy to defraud, entered into by the said Ballagh and the said Miller. There was substantial and ample evidence to support such a finding and there was no evidence to the contrary.

37. The District Court erred in finding that, prior to the participation in and approving of the election of H. C. Armisted, Howard Burrell, J. C. Ballagh and D. G. Miller as directors and officers on June 21, 1941, the said Dulin knew the attitude of said persons concerning the compensation that said persons considered should properly be paid to the said Ballagh and the said Miller during 1941. There was no evidence to support this finding. The evidence was to the contrary.

38. The District Court erred in finding that plaintiff has waived any right it might have to complain of the compensation paid to the said Ballagh and/or the said Miller by Patterson-Ballagh Corporation from January 1, 1941, to the time of filing suit herein on

September 10, 1941. There was no evidence to support this finding. The evidence was to the contrary.

39. The District Court erred in concluding, as a conclusion of law, that the compensation paid by Patterson-Ballagh Corporation to the said Ballagh from January 1, 1939 to the time of filing suit herein has been fair, just, or reasonable as to said corporation at the various times it was authorized, approved, or paid. There was no evidence to support any such conclusion. The evidence was to the contrary. The conclusion was erroneous as a matter of law.

40. The District Court erred in concluding, as a conclusion of law, that the compensation paid by Patterson-Ballagh Corporation to the said Miller from January 1, 1940 to the time of filing suit herein was fair, just, or reasonable as to said corporation at the various times it was authorized, approved, or paid. There was no evidence to support any such conclusion. The evidence was to the contrary. The conclusion was erroneous as a matter of law.

41. The District Court erred in concluding, as a conclusion of law, that plaintiff has waived any right to complain of the compensation paid by Patterson-Ballagh Corporation to the said Ballagh and/or the said Miller from January 1, 1940 to the time of filing suit herein. There was no evidence to support any such conclusion. The evidence was to the contrary. The conclusion was erroneous as a matter of law.

42. The District Court erred in concluding, as a conclusion of law, that plaintiff has waived any right

to complain of the compensation paid by Patterson-Ballagh Corporation to the said Ballagh and the said Miller from January 1, 1941 to the time of filing suit herein on September 10, 1941. There was no evidence to support any such conclusion. The evidence was to the contrary. The conclusion was erroneous as a matter of law.

43. The District Court erred in finding and concluding that plaintiff is not entitled either on its own behalf or on behalf of Patterson-Ballagh Corporation to any relief or recovery whatsoever against any of said defendants. There was no evidence to support any such finding or conclusion. The evidence was to the contrary. The conclusion was erroneous as a matter of law.

44. The District Court erred in finding and concluding that the defendants herein, or any of said defendants, are entitled to recovery of or from plaintiff their, his, or its respective costs of suit herein incurred. There was no evidence to support any such finding or conclusion. The evidence was to the contrary. The conclusion was erroneous as a matter of law.

45. The District Court erred in ordering that judgment be entered in favor of the defendants. There was no evidence and there were no findings, except erroneous findings, to support this order.

46. If the District Court, in determining the value of the services of the said Ballagh to Patterson-Ballagh Corporation, or in determining that the salary

and/or compensation of the said Ballagh for services to Patterson-Ballagh Corporation was not excessive, took into consideration the value of any claimed services rendered by him as an inventor or as the patentee of any inventions or as the applicant for any patent or the value of any inventions or of any patents or of any applications for patents of the said Ballagh, whether or not assigned to Patterson-Ballagh Corporation, the said District Court erred in so doing. Such claimed services were not rendered to Patterson-Ballagh Corporation and, if rendered, were outside of the scope of Ballagh's employment by such corporation.

47. If the District Court, in determining the value of the services of the said Miller to Patterson-Ballagh Corporation, or in determining that the salary and/or compensation of the said Miller for services to Patterson-Ballagh Corporation was not excessive, took into consideration the value of any claimed services rendered by him as an inventor or as the patentee of any inventions or as the applicant for any patent or the value of any inventions or of any patents or of any applications for patents of the said Miller, whether or not assigned to Patterson-Ballagh Corporation, the said District Court erred in so doing. Such claimed services were not rendered to Patterson-Ballagh Corporation and, if rendered, were outside of the scope of Miller's employment by such corporation.

SUMMARY OF APPELLANT'S ARGUMENT.

There is only one real issue in this case, to wit, were the salaries of the defendants Ballagh and Miller (during the years 1939 and 1940 and that part of the year 1941 prior to September 10, the date of the commencement of this action) excessive?[4] Appellant's argument that they were excessive divides itself as follows:

1. Due to the relationship of the defendants to the Corporation it was not only unnecessary for plaintiff to establish fraud, but a presumption arose in plaintiff's favor that the salaries were excessive.

2. The following circumstances establish the excessiveness of the salaries. These circumstances, when considered together, are conclusive:

(a) The salaries paid to the defendants were vastly in excess of salaries paid by comparable and even by much larger companies.

(b) The salaries paid to the defendants were several times greater than their prior compensa-

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[4]The expression "only real issue in this case" is used advisedly. By an amendment to the answer presented at the trial, the defendants for the first time set up a claimed waiver by plaintiff of its right to insist upon a return to the Corporation of any part of defendants' salaries (R., 29). Later defendants limited their claim to a waiver for the period subsequent to January 1, 1941, and the Court erroneously found that for such limited period the defense of waiver was good (R., 69-72). The defense was obviously an afterthought and was in direct conflict with uncontradicted testimony in the record that all salaries as to which complaint is made by plaintiff were fixed by the defendants over plaintiff's express objections (R., 243-244; 265; 298-306). Unless counsel have something to urge in addition to what was urged in the trial Court, our statement that there is "only one real issue" is unqualifiedly true. We await defendants' brief.

tion from other companies by which they had been employed.

(c) The salaries paid to the defendants were out of all proportion to the net profits of the Corporation.

(d) The salaries paid to the defendants were out of all proportion to the invested capital and the size of the business of the Corporation.

(e) The increases in defendants' salaries were made without any corresponding increase in the amount or the responsibility of the services rendered or to be rendered by them.

3. The defendants' salaries were not justified, in whole or in part, by defendants' claimed services as inventors.

(a) The By-Laws of the Corporation and the resolutions passed by its Board of Directors showed that the defendants were not being compensated as inventors.

(b) Any services as inventors were not performed for the Corporation.

(c) The inventions of the defendants could not be classed as services.

(d) Even if the inventions of the defendants are considered, they were not of sufficient value to support the amount of the salaries.

4. Defendants' salaries were part of a conspiracy by defendants to fraudulently enrich themselves at the expense of plaintiff, the minority stockholder.

CONCISE ARGUMENT OF THE CASE.

1.

DUE TO THE RELATIONSHIP OF THE DEFENDANTS TO THE CORPORATION IT WAS NOT ONLY UNNECESSARY FOR PLAINTIFF TO ESTABLISH FRAUD, BUT A PRESUMPTION AROSE IN PLAINTIFF'S FAVOR THAT THE SALARIES WERE EXCESSIVE.

During the period in question the defendants were the beneficial owners of seven hundred and fifty (750) of the outstanding one thousand (1,000) shares of the Corporation (R., 61). The Board of Directors consisted of five members, all of whom, with the exception of Dulin (plaintiff's President) had been selected by the defendants (R., 352-354; 391; 393). Miller was President and General Manager, Ballagh was Secretary and Treasurer and Sales Manager (R., 62). The other directors were Burrell and Armington. They never voted against the defendants and took little part in the meetings (R., 394; 449; 537). The defendants absolutely directed the acts and policies of the Corporation (R., 354; 381; 399). Dulin was never consulted as to the amount of salaries (R., 355-357; 392). The amounts were fixed in advance by Ballagh and Miller (R., 355-357; 361; 381; 384; 390). Dulin was always protesting (R., 243-244; 265; 298-306). In one case salaries were raised by Ballagh and Miller without even the formality of a directors' meeting (R., 355).

The foregoing facts show conclusively that the defendants fixed their own salaries. They were dealing with themselves. When directors of a corporation are in this position, a minority stockholder, in order to

force restitution by the directors to the corporation, need not establish fraud; there, also, arises a presumption that the salaries were unreasonable and the burden of proof is upon the directors to show the contrary. *Stratis v. Andreson,* 254 Mass. 536, 150 N. E. 832, and cited cases, should be conclusive. We quote from the *Stratis* case as follows:

> "It is immaterial in this connection whether there was actual fraud. The right of recovery for the benefit of the corporation rests upon the excessive payment to a director. Von Arnim v. American Tube Works, 74 N. E. 680, 188 Mass. 515; Meyer v. Ft. Hill Engraving Co., 143 N. E. 915, 249 Mass. 302. This conclusion is supported by the great weight of authority elsewhere. Carr v. Kimball, 139 N. Y. S. 253, 153 App. Div. 825, affirmed in 109 N. E. 1068, 215 N. Y. 634; Godley v. Crandall & Godley Co., 105 N. E. 818, 212 N. Y. 121, 130, 131, L. R. A. 1915D, 632; Decatur Mineral Land Co. v. Palm, 21 So. 315, 113 Ala. 531, 59 Am. St. Rep. 140; Beha v. Martin, 171 S. W. 393, 161 Ky. 838, 844; Matthews v. Headley Chocolate Co., 100 A. 645, 130 Md. 523, 536; Green v. National Advertising & Amusement Co., 162 N. W. 1056, 137 Minn. 65, L.R.A. 1917E, 784; Lillard v. Oil, Paint & Drug Co., 56 A. 254, 58 A. 188, 70 N. J. Eq. 197; Booth v. Beattie, 118 A. 257, 123 A. 925, 95 N. J. Eq. 776; Sotter v. Coatesville Boiler Works, 101 A. 744, 257 Pa. 411."

There is some very appropriate language in *Geddes v. Anaconda Mining Co.,* 254 U. S. 590. We quote from page 599 of the opinion:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. *Twin-Luck Oil Co. v. Marbury,* 91 U. S. 587, 588; *Thomas v. Brownville Ft. Kearney & Pacific R. R. Co.,* 109 U. S. 522; *Wardell v. Railroad Co.,* 103 U. S. 651, 658; *Corsicana National Bank v. Johnson,* 251 U. S. 68, 90." (Underscoring ours.)

Although *Davids v. Davids,* 120 N. Y. Sup. 350, is a holding by an inferior court, nevertheless the language is so well chosen that we quote from page 353, as follows:

> "It is also urged on the part of the appellants that the plaintiff failed to prove the salaries voted were excessive, and that the bad faith of the directors cannot be presumed. The suggestion is based upon an erroneous assumption as to the precise relation in which the defendants, as directors, stood to the corporation. They occupied a position of trust, and, when the fact appeared that they had voted themselves salaries by a resolution in which they all joined, then they were

> put in the position of trustees dealing with themselves, to their own advantage, with respect to their trust. In such case the presumption is that they acted in their own interest, to the prejudice of the corporation, and the burden was upon them to overcome such presumption. Sage v. Culver, 147 N. Y. 241, 41 N. E. 513."

Authorities to the same effect are: *Schall v. Althaus,* 203 N. Y. S. 36; *Carr v. Kimball,* 139 N. Y. S. 253; *Ross v. Quinnesec Iron Mining Co.,* 227 Fed. 337; *Church v. Harnit,* 35 Fed. (2d) 499; *Jordan v. Jordan Co.,* 94 Conn. 384, 109 Atl. 181; *O'Leary v. Seemann,* 76 Colo. 335, 232 Pac. 667; *Davis v. Thomas A. Davis Co.,* 63 N. J. Eq. 572, 52 Atl. 717, p. 718.

At this point, and before proceeding with the following argument, we desire to make it clear that plaintiff is confident the court will not be called upon to rely upon the foregoing authorities. These authorities emphasize the position in which the defendants find themselves and, if necessary, plaintiff would be justified in urging a reversal based thereon. It will be demonstrated that there is no necessity for urging the presumption in favor of plaintiff. The amounts of the salaries themselves, in light of the circumstances in this case, are conclusive as to their excessiveness. It will, furthermore, be demonstrated at the end of this brief that the defendants in drawing their salaries were guilty of fraud. As a matter of fact, there is only one phase of this case where the foregoing principles may, if at all, become material (pages 42 to 47 hereof).

2.

THE CIRCUMSTANCES ESTABLISHING THE EXCESSIVENESS OF DEFENDANTS' SALARIES ARE SEVERAL. TAKEN TOGETHER THEY ARE CONCLUSIVE.

We again set forth the amounts of those salaries:

	For the calendar year 1939	For the calendar year 1940	For that portion of the calendar year 1941 prior to September 10
Ballagh	$15,000.00	$30,166.66	$19,000.00[6]
Miller	13,000.00[5]	19,750.00	12,000.00[6]
Totals for the two executives (R., 66.)	$28,000.00	$49,916.66	$31,000.00

(a) The salaries paid to the defendants were vastly in excess of salaries paid by comparable and even by much larger companies.

Through the witness Bunch there was put in evidence a long list of companies showing the total of their two highest executive salaries, the amounts of their capital and surplus, and their profit or loss figures. This tabulation (Ex. 19, R., 438) is instructive. We set it forth at length:

[5]The above item of $13,000 paid to Miller in 1939 was not included in plaintiff's complaint. The setting forth of this figure is purely informative.

[6]These figures do not give an accurate picture, since the defendants had been taking from the Corporation additional amounts toward the close of each year. In the fiscal year 1941 their combined salaries were $53,666.00 (Ex. 5C).

Fiscal Year		Two Highest Salaries	Capital and Surplus	Profit or Loss
12/31/41	Gladding McBean & Co.	$49,673	$7,447,062	$ 603,984
12/31/40	Western Pipe & Steel Co. of Cal.	45,200	4,576,212	312,477
6/30/40	Hancock Oil Co. of Calif.	44,150	4,613,811	1,138,528
8/31/41	Consolidated Steel Corp.	44,000	4,841,381	667,518
12/31/40	Sontag Chain Stores Co.	40,120	2,128,971	225,931
12/31/40	Lane Wells Co.	38,500	2,206,900	605,977
12/31/40	Emsco Derrick & Equipment Co.	38,400	3,687,015	*82,475
12/31/40	Ryan Aeronautical Co.	37,688	1,424,821	358,344
12/29/40	Van de Kamp's Holland Dutch Bakers	37,100	1,204,215	203,209
12/31/40	Los Angeles Investment Co.	32,950	6,262,240	161,474
12/31/40	Puget Sound Pulp & Timber Co.	31,600	5,034,611	795,553
12/31/40	Blue Diamond Corp.	30,060	2,201,131	55,935
12/31/40	Electrical Products Corp.	28,578	2,120,478	342,674
12/31/40	Universal Consolidated Oil Co.	24,530	1,612,734	228,190
12/31/40	General Metals Corp.	21,200	1,216,189	259,623
12/31/40	Pacific Clay Products Co.	21,037	1,454,661	53,236
12/31/40	Taylor Milling Co.	21,000	2,421,223	197,589
12/31/40	Bolsa Chica Oil Corp.	15,675	1,034,417	*47,907*
12/31/40	Weber Showcase & Fixture Co.	14,822	2,060,724	58,692
5/27/40	Solar Aircraft Co.	14,034	747,819	51,546
6/30/40	Menasco Manufacturing Co.	14,000	873,021	190,137
6/30/40	Roberts Public Markets, Inc.	13,000	631,205	206,252
12/31/40	Bandini Petroleum Co.	10,680	1,538,075	2,412
12/31/40	Holly Development Co.	9,650	721,569	51,691
12/31/40	Merchants Petroleum Co.	9,400	167,904	*2,082*
10/31/40	Intercoast Petroleum Co.	8,600	428,668	3,080
12/31/40	Lincoln Petroleum Co.	8,020	143,369	*27,613*
12/31/40	Oceanic Oil Co.	6,650	256,502	*6,565*
12/31/40	Norden Corp., Ltd.	5,935	377,153	10,793
12/31/40	Mascot Oil Co.	5,400	329,492	4,789
12/31/40	Rice Ranch Oil Co.	5,013	284,502	12,089
12/31/40	Occidental Petroleum Co.	4,895	140,785	*418*
12/31/40	Holly Oil Co.	4,800	399,505	*10,092*
2/28/41	Mount Diablo Oil, Mining & Development Co.	3,950	139,201	13,874
12/30/41	Patterson-Ballagh Corp.	53,666	201,023	22,999

*Italics designate losses.

It will thus be seen from the foregoing tabulation that not one of the listed companies paid compensation as large as this corporation, and that the only companies paying compensation which even approached the compensation paid to the two defendants were organizations with a capital and surplus of better than $2,000,000 and, in one case, over $7,000,000, with yearly profits ranging from $225,000 to over $1,100,000. The capital and surplus of Patterson-Ballagh Corporation at best, was only a little over $200,000 (Ex. 5C). The Corporation's net profits (after the deduction of salaries, as was the case with the Bunch figures) for the fiscal year 1938 were $26,496.35; for the fiscal year 1939, $20,927.25; for the fiscal year 1940, $20,519.85; and for the fiscal year 1941, $19,220.64 (Ex. 5). The fiscal year of this Corporation ended upon November 30. Any variations between the calendar and fiscal year are of no great importance.

(b) The salaries paid to the defendants were several times greater than their prior compensation had been from other companies by which they had been employed.

The record shows without conflict that, in prior employment, the defendant Miller had earned not in excess of $800 per month and, likewise, the defendant Ballagh not in excess of $800 per month (R., 379; 539). Although plaintiff concedes that the amounts of salaries which had been paid by other concerns to the defendants are not conclusive, these amounts are certainly not only instructive, but most persuasive, when such vast discrepancies as in the present case are shown.

(c) The salaries paid to the defendants were out of all proportion to the net profits of the Corporation.

The Corporation's net profits before deduction of the defendants' salaries were, for the year 1939, $48,927,[7] for the year 1940, $68,936, and for the year 1941, $72,887. The combined salaries of defendants for the year 1939 were $28,000, for the year 1940, $48,417, and for the year 1941, $53,666. These figures show that defendants were taking the following percentages out of net profits (before the deduction of their salaries), to-wit: For the year 1939—57%, for the year 1940—70%, and for the year 1941—74%. This all appears on Exhibit 18A.

It is interesting to note that although the profits did increase somewhat during these years, the increase in salaries was infinitely greater in proportion and that profits apparently furnished no yardstick.

The earnings of the Corporation, about the times of the respective raises, should be considered.

The first raise was upon August 22, 1939, retroactive to March 1st (R., 230). According to the Corporation's own statements the Corporation sustained a loss in August of $1,814.59. Its profit for July had only been $1,940.11, for June $3,871.13, and for May $1,-865.67. At that time, and for the period since November 30, 1938, it was in the "red" $2,408.94. In April it had sustained a loss of $645.78 (Ex. 6A). This was no time for a raise. The Corporation's own statements were not, however, accurate. Conditions were

[7]This and the following figures refer to fiscal years.

much worse. Those statements showed, for the year 1939, a profit of $33,978.44. When Messrs. Pennington-Swanson, the certified public accountants, examined the profits for the year, the figure of $33,978.44 was reduced to $20,927.25 (Ex. 5A).

The second raise of salaries occurred on March 18, 1940 (R., 242-243). The Corporation's figures showed a profit for March in the sum of $10,485.50, for February of $11,663.33, for January of $7,567.04, and for December, 1939, of $5,375.62. These figures were, again, not accurate. The Corporation placed its net profit for the fiscal year 1940 at $51,586.70 (Ex. 6B). Messrs. Pennington-Swanson arrived at the figure of $20,-519.85 (Ex. 5B). Furthermore, the outlook in March of 1940 for future profits was not good. Profits, except for one month, namely, the month of July, when they were $10,643.00, showed a marked decrease. In May they were only $2,883.67; in June $2,887.53; in August $4,033.64; in September $3,211.79, and in October $1,676.07. In November we meet a loss of $11,-178.34 (Ex. 6B). Again this was no time for a raise.

The next raise was on November 29, 1940 (R., 251-252). The figures already given demonstrate that it was no time for a raise.

Of interest also are the profits for 1941. The Corporation's own figures place them at $35,722.73 (Ex. 6C). Messrs. Pennington-Swanson decreased this figure to $19,220.64 (Ex. 5C). Notwithstanding, the salaries to the defendants were not reduced but continued at the same rate.

We refer again to the Bunch figures. His profit and loss figures are, however, after deduction of the salaries of the two highest executives. They present no cases at all comparable, except cases where at least one of the two following elements was present, to-wit: either the particular company was operating at a loss, or the particular company had several times more capital and surplus invested. Even in each one of those exceptional cases the total, in dollars and cents, of the two highest salaries was less than in the present case.

(d) Salaries paid to the defendants were out of all proportion to the invested capital and the size of the business of the Corporation.

The capital and surplus of the Corporation during the period involved in this litigation was, at best, only a little over $200,000 (Ex. 5-C).[8] If the figures of the witness Bunch are again taken for comparison, we find that the compensation of the defendants was out of all reason. Those figures show that in a company with capital and surplus of the size of this Corporation the combined salaries of the two highest paid executives should run at most between $9,000 and $10,000 per annum. The defendants' salaries for the fiscal

[8]The Corporations' own financial statements, as well as the Pennington-Swanson statements, gave a figure for capital and surplus for the years 1939-1940 considerably larger than for 1941. This was due to the fact that in those years an item in the amount of $80,703.61 for good will appeared. This item of good will was thrown out the window in 1941 and, therefore, bears all the earmarks of having been "water". Eliminating good will, the exact figures for capital and surplus, as shown by the certified accountants, were, for 1939, $162,894.81; for 1940, $181,802.80, and for 1941, $201,023.44 (Ex. 5).

year 1940 were $48,417, and $53,666 for the fiscal year 1941 (Ex. 18-A).

Certain aspects of the Corporation's business may at this point be material. The Corporation had only one manufacturing establishment, which was small (R., 349-350; 555); the average number of its employees, in all parts of the country, was probably only about forty (R., 350); the Corporation had no financial problems which would require exceptional services (R., 350); the business could be well classed as a small "specialty business". There are hundreds of such businesses in southern California and elsewhere. It would be a matter of amazement if any one of them presented such a salary picture.

The witness Bunch labored under a handicap. He could not delve into the financial matters of these numerous businesses. He was forced to confine himself to companies whose finances were public property. Nevertheless, the Bunch figures certainly demonstrate enough. Salaries for the two highest executives of $50,000 per annum, more or less, must be out of all proportion to a capital and surplus of approximately $200,000. They reached the annual rate of over one-fourth of the entire capital and surplus.

(e) The increases in defendants' salaries were made without any corresponding increase in the amount of the responsibility of the services rendered or to be rendered by defendants.

Ballagh's salary was increased from $15,500 in the fiscal year 1939 to almost $30,000 in the fiscal year 1940 (R. 277-282). Miller's salary was increased from

$13,000 in 1939 to almost $20,000 in 1940. Their combined salaries amounted to $53,666 in 1941 (Ex. 18-A). We ask, "How can these increases be justified?"

There were no corresponding increases either in the duties or responsibility of Ballagh (R., 350-351). Miller took over the exact same work as Patterson had been doing. There was no increase in Miller's duties or responsibilities (R., 351; 381).

It is well established law that ordinarily there should be an increase in duties or responsibilities in order to warrant an increase in salaries. We cite *Schall v. Althaus,* 203 N. Y. S. 36; *Atwater v. Elkhorn Valley Coal Land Co.,* 171 N. Y. S. 552; *Kreitner v. Burgweger,* 160 N. Y. S. 256; *Raynolds v. Diamond Mills Paper Co.,* 69 N. J. Eq. 299, 60 Atl. 941, pp. 947, 948.

In the *Raynolds* case, after mentioning the lack of increase in services rendered, the court said:

> ". . . . I incline to think that this is an instance where equity should look behind the fiction of corporate existence, and, in measuring the compensation of the managers of a corporation by the success which their operations have attained, analyze the success to a large extent, if not wholly, from the stockholder's point of view—from the point of view of the man who cannot touch a dollar of the accumulated profits of the corporation until a dividend has been declared."

It is again of note that during the period of importance in this case the Corporation never declared a dividend in which plaintiff could share, and ceased

to pay royalties to the plaintiff, which the Corporation had contracted to pay by the terms of the agreements introduced as Exhibits 15-A, 15-B, 15-C, 15-D. We mention this in passing.

3.

THE DEFENDANTS' SALARIES CANNOT BE JUSTIFIED, IN WHOLE OR IN PART, BY DEFENDANTS' CLAIMED SERVICES AS INVENTORS.

In approaching this subject, it is well to dwell for a moment upon the injustice of allowing the defendants to prevail by relying upon their claimed inventions. The complaint in this case was drawn upon the theory that there should be paid back to the corporation the excessive parts of the salaries paid to the individual defendants as President and Secretary and Treasurer. Not one word was said about inventions or patents. The answer was in due course filed. There was no word of inventions or patents. It was not until the trial that this element developed. Plaintiff was given no notice that the value of patent rights or inventions would be in any manner involved. These rights or inventions had never been put into issue and, therefore, in all fairness, should not have been considered by the Court.

If the individual defendants had any rights against the Corporation in regard to their inventions or patents, which they claim to have transferred to the Corporation, they should have brought a separate suit or perhaps have interposed a counterclaim or cross-

complaint. Neither course was taken. The obvious conclusion is that counsel, finding impossibility in justifying the salaries of the two gentlemen as president and secretary and treasurer, resorted to this other element in hopes of success. If counsel is at liberty to do so, there is no reason why, when a corporate officer is sued for excessive salaries received as such officer, he should not be at liberty to drag out of the dim and distant past some claimed benefit in the conveyance of property, use of personal influence, lobbying, or whatnot, and thus try to justify what he has received.

(a) The By-Laws of the Corporation and the resolutions passed by its Board of Directors showed that the defendants were not being compensated as inventors.

Section 3 of Article III of the By-Laws reads as follows: "The officers may receive only such salaries as the Board of Directors may from time to time determine. Until the salary of an officer has been fixed by resolution of the Board of Directors, such officer shall serve without compensation." (R., 108.)

This By-Law provided, in effect, that unless the salary of an officer had been fixed by resolution such officer was to serve without compensation.

The resolutions of the Directors as to the salaries should be read. They show expressly that Miller was being compensated as President and General Manager and in no other capacity; they show that Ballagh was being compensated as Secretary and Treasurer and Sales Manager and in no other capacity. They were not being compensated as inventors. The minutes do

not even casually mention any such employment. We consider this element of such importance that we quote from the minutes at length and set forth the pertinent excerpts in the Appendix to this brief.

Furthermore, inventions were never mentioned as a reason for increase of salaries (R., 395-396).

Defendants are attempting to justify compensation paid them in specified capacities by resorting to claims that they should have received compensation in other capacities. The case of *Stratis v. Andreson,* 254 Mass. 536, 150 N. E. 832, is in point. There the salary of the Treasurer, General Manager, and Clerk, who were one and the same person, was not paid as a single item, but was divided into three separate items. The Supreme Judicial Court of Massachusetts held that each separate item must stand on its own footing. The following appears in the opinion:

> "The salary to the treasurer, general manager and clerk was not a single item but was divided into three separate items. Each item must stand on its own footing. The salary paid him as clerk has been found to be more than its fair value and the excess must be returned even though the entire compensation regarded as a unit was not excessive. It was not paid as a unit."

Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 56 Atl. 254, contains a somewhat similar situation. There the manager of a corporation, in an attempt to justify his salary, which was greatly in excess of the salary of his predecessor, showed that his predecessor was receiving other benefits from the corporation

which should be taken into consideration. The court held no, and said, at page 260:

> "The argument that the payment of dividends to Lillard was really a salary, and, together with his salary, amounted to much more than Allison received as salary, and the latter's salary is therefore to be considered fair, is also unsound. This transaction was a purchase for which Lillard gave his notes to Allison and became his debtor. He owned, before the purchase, a large number of shares, and the transaction as between Allison and Lillard was in all respects a purchase of the stock, and not an arrangement for salary. It was so considered and treated by both, and, although the business under Lillard's management was so profitable as to pay the notes for the purchase largely out of his dividends on the stock purchased, Lillard took the risk, when he gave the notes, that they might not be paid out of the profits, and Allison derived his proportionate benefits as stockholder by the dividends received on his stock under Lillard's management. The payment of Lillard's notes from this source is not now to be considered as a salary, or as justifying Allison's sure return, in the form of a large salary for management, of a sum approximating or proportioned to the dividends Lillard received on his stock while manager."

Again referring to the *Stratis case,* it is self-evident that, if overpayment to an officer in one capacity cannot be justified by underpayment to the same person acting in another capacity, certainly an overpayment as president or secretary and treasurer or manager or sales manager cannot be justified by claimed com-

pensation which was never authorized in any corporate resolution.

It was conceded by counsel in the trial court that the defendants must look to the resolutions of the Board of Directors for such compensation as they received. There was no mention of inventions in any of the resolutions. At page 23 of their brief on motion for a new trial, the following appeared:

> "However, at this point, an important distinction between the cases cited by plaintiff and the position of defendants herein must be borne in mind. The individual defendants in this case are not seeking to recover compensation which has never been authorized. They are seeking merely to retain compensation paid to them pursuant to duly authorized resolutions." (Underscoring ours.)

(b) The services as inventors, for which the defendants claim compensation, were never performed for the Corporation.

These services were performed by the individual defendants for themselves. This was conceded by counsel in the trial court. On page 40 of their brief on motion for a new trial, the following appeared:

> "As to the law on the patents existing in this case and on those patents anticipated as the result of the inventions involved in this case, it is certain that prior to the assignments of such patent or patent applications, title to the patents or patent rights was in the individual defendants."

Counsel's position finds the following uncontradicted support in the record:

"By Mr. Bednar. Q. Mr. Ballagh, has there ever been any contract between you and Patterson-Ballagh Corporation requiring you to spend your time inventing?

A. No, sir.

Q. Has there ever been any such contract as to Mr. Miller?

A. No, sir.

Q. Has there ever been any contract between you and Patterson-Ballagh Corporation requiring you to assign any of your inventive rights or patents to the corporation?

A. No, sir.

Q. Has there ever been any such contract as to Mr. Miller?

A. No, sir." (Ballagh's Testimony, R., 506.)

"Q. At any of these meetings of the Patterson-Ballagh Company which you attended, was anything ever said as to employing either Mr. Ballagh or Mr. Miller as inventors or designers?

A. Never." (Dulin's Testimony, R., 393.)

"Q. When these inventions were originally made, whom did they belong to?

A. Ballagh.

Q. And is it your position that until they were transferred to the company they still belonged to Ballagh?

A. Yes. Mr. Patterson, for example, had made a patent some four or five years previously, which he took in his own name and refused to recognize the company as having any interest in it of any character." (Burrell's Testimony, (the Corporation's attorney), R., 450.)

Thus it is apparent that even considering patents or inventions in the category of services rendered, they were not rendered to the Corporation.

There is evidence that the two defendants had assigned, or would assign, their inventions to the Corporation. There was never any action, however, by the board of directors authorizing the purchase of these inventions. In fact, the inventions and the assignments were unknown to plaintiff (R., 406). At best, what happened was that certain assignments may have been made, but, if so, they were voluntarily made, due no doubt to the fact that the two defendants owned three-fourths of the stock, and were treating the Corporation as their own. They did not for a moment believe that plaintiff could profit by any such transfer. They had no intention of paying further dividends or royalties. They knew that the payment of dividends could not be forced, and they had secured an opinion of counsel that royalties could be forgotten (R., 225). No inventive services were ever rendered to the Corporation. As heretofore pointed out, the evidence was, without qualification, to the contrary.

Authorities are to the effect that when an officer performs services outside of his duties he must have a contract with the Corporation before he can recover for such services. We cite *Finch v. Warrior Cement Corporation,* 16 Del. Ch. 44, 141 Atl. 54; *Jones v. Foster,* 70 Fed. (2d) 200; *O'Leary v. Seemann,* 76 Colo. 335, 232 Pac. 667; *Pindell v. Conlon Corporation,* 303 Ill. App. 232, 24 N. E. (2d) 882; *Larkin v. Enright,* 312 Ill. App. 184, 37 N. E. (2d) 905; *In re Dr. Voorhees Awning Hood Co.,* 187 Fed. 611.

(c) The inventions of the defendants cannot be classified as services.

We are not dealing with services, but with property rights. The defendants were at liberty to transfer or not to transfer these property rights as they saw fit. Their duties as President or General Manager, or Secretary or Treasurer or Sales Manager did not comprise inventive services (R., 373). Nowhere in the minutes is there mentioned any offer to transfer inventions, nor any acceptance of any such offer by the Corporation; in fact, the minutes make no reference to inventions. Had the Corporation suddenly become insolvent and creditors appeared at the front door, the patents and other rights heretofore transferred would never have been transferred and no additional transfers would have been made. This case results in a situation just as clear as though the defendants were attempting to bolster up excessive salaries by claiming that certain real estate or personal property, other than patents, transferred or to be transferred to the Corporation, should justify their salaries. Let us consider the reverse: Let us assume that the defendants had transferred a plant to the Corporation at a figure so excessive that it could not be justified. Let us assume that they were haled into court by a minority stockholder asking that the transaction be rescinded. Could they justify the excessive price by claiming that they were underpaid as officers, and that part of the money received as the purchase price was in fact additional salary? We cannot conceive of a court going this far. The same legal principles govern.

Counsel attempted to argue that when the Corporation accepted assignments of the inventions and proceeded to use them, the Corporation accepted the inventive services and impliedly agreed to pay therefor. This was the only explanation offered. The Board of Directors never accepted the assignments. Furthermore, with what are we dealing? Services or property? It cannot be both. Counsel conceded that the inventions belonged to the individual defendants up to the time of assignment. As pointed out, if creditors appeared they never would have been assigned, and the services would have remained services rendered by the defendants to themselves. This looks like property rights, and not services rendered to the Corporation. It is a novel doctrine of law that, if work is done in perfecting patents and those rights or patents are later transferred, the services in perfecting the patents immediately attach to the transferee and have been, *ex post facto,* rendered to such transferee. Counsel must have in mind some such doctrine as covenants running with the land. The whole sum and substance of the matter is that we are dealing with property rights and not with services.

(d) Even if the inventions of the defendants should be considered, they were not of sufficient value to support the amount of the salaries.

We anticipate that counsel will urge that as to this phase of the case there was a conflict in testimony and, therefore, we are foreclosed by the findings of the trial court. We point out that not only is this an

equity case, but also that under Rule 52(a) of the Rules of Civil Procedure, where findings are made by the court without a jury, the Appellate Court is not limited to the mere question whether there is any substantial evidence to support the findings, but may set them aside if against the clear weight of evidence (*State Farm Mut. Automobile Ins. Co. v. Bonacci,* 111 Fed. Rep. (2d) 412).

In this same connection we refer the court to the authorities cited at pages 23 to 25 of this brief, that the burden of proof was upon the defendants. We emphasize that the defendants, in urging the value of inventions, are dealing with an intangible. Throughout the case they were never able to demonstrate what value, if any, should be attributed to this intangible. Therefore, they could not have met the burden of proof.

Coming to the evidence, we first refer the court to Exhibit A. That exhibit was prepared by the defendants. It shows that by far the great part of the Corporation's business was in the sale of casing protectors.[9] As a matter of fact, of the total gross sales of the Corporation for the year 1939 of approximately $336,500, the sales of casing protectors constituted almost $262,000; for the year 1940, out of gross sales of approximately $330,000, casing protector sales amounted to almost $234,000; and for the year 1941, out

[9]"Casing protectors" are to be distinguished from "tubing protectors". "Tubing protectors" were a very minor item (R., 453).

of gross sales of a little over $366,000, casing protector sales amounted to approximately $245,000 (R., 343). The casing protector business had existed ever since the formation of the Corporation; in fact, had been taken over from the original partnership of Patterson & Ballagh. The defendants claim, however, that by invention they had improved the old casing protector by placing at each end thereof a so-called "lip". This was but a trivial improvement (R., 367). Not only does the testimony of the witnesses Chesnut and Grant so state (R., 544-545), but an examination of Exhibit E will so demonstrate.

There is no showing that the Corporation's business would not have proceeded equally well without the claimed invention and, for that matter, no lip protectors were sold in the year 1939 (R., 366), yet the protector business for that year substantially exceeded the protector business for the year 1940 and also for the year 1941. The witness Burrell admitted that the lip protector did not increase the protector business (R., 454).

The defendants also relied upon the claimed invention of the pipe wipers. The sales of pipe wipers were relatively unimportant. In 1939, out of total gross sales of about $337,000, the sales of pipe wipers were only slightly in excess of $12,000; in 1940, out of a total sales of about $330,000, the pipe wipers sales amounted to only a little over $30,000; and in 1941, out of total sales of approximately $366,500, the pipe wipers sales amounted to less than $44,000 (Ex. A). The same situation existed as to pipe wipers that ex-

isted as to protectors—there was competition (R., 371-372).

The only other item of any moment whatsoever in total sales of the Corporation was wire line guides. These usually outranked pipe wipers (R., 345) but they were not of defendants' invention; in fact, royalties were being paid thereon to other parties (Ex. A) (R., 458).

The other items were trivial and to a great extent were the inventions of outside parties to whom royalties were being paid (R., 346-347; 553-555). The largest of these other items as to which invention was claimed by the defendants was tubing protectors. In 1939 their sales amounted to only a little over $3000; in 1940 to less than $9000; and in 1941 to less than $17,000 (Ex. A).

The defendants stressed the importance of the hydraulic applicator, which they claim to have invented. The hydraulic applicator was not an article for sale but was a contrivance for placing casing protectors upon the drill pipe. The defendants claimed that it was much superior to the old mechanism. However, they are met with the fact that no patent had ever been granted (R., 492). Competition exists (R., 505). They are also met with the difficulty of a total lack of showing that the Corporation's business would not have been just as great had the hydraulic applicator never come into being. A reference to Exhibit A will show not only, as heretofore stressed, that the business in casing protectors was bigger in 1939

than in either 1940 or 1941, but that in the installations in 1939, only 7% thereof were made by the hydraulic applicator.

The witness Chesnut testified, among other things, in regard to all of the inventions, as follows:

> "A. I would say that they are well described by the term 'run of the mill inventions.' They relate to minor improvements, and probably useful improvements in inventions or in devices made by a specialty manufacturer, which includes rubber products in the oil industry, and in any business we expect the manufacturer will improve his products from time to time and find other items which fit into his line, and I would say they are just average inventions, if they are inventions." (R., 570.)

The witness Grant, who was a disinterested party and whose testimony commences at page 542 of the record, testified that the lip protector had very little, if any, advantage over the ordinary protector.

It is most noteworthy that the profits of the business did not greatly increase (Ex., 5). Counsel's position must be and, as we understand it, was that had it not been for the use of the inventions the business would have decreased. Of course, this is mere conjecture and surmise, and should be so labeled.

Certain additional circumstances are worthy of comment. The part played by the claimed inventions of Miller in the Corporation's total sales is infinitesimal (R., 376-377). In 1939 his claimed inventions played no part whatsoever; in 1940 they could, at best, have accounted for only approximately $2600; and in 1941

for only approximately $6000 (Ex. A) (R., 373). Neither the inventions of Miller nor those of Ballagh were ever discussed or mentioned, except perhaps in a negligible fashion, at the meetings of the stockholders or directors of the Corporation. The minutes are absolutely silent on the subject (Ex. 1, R., 206-267). The financial statements of the Corporation not only place no value upon the claimed inventions, but they were not even listed as an asset. It is surprising that they could have been of such great moment.

There is, however, a very considerable amount of testimony having to do with claimed inventions. Its only danger from our standpoint is its bulk. Due to its bulk it can be misleading. When analyzed, it amounts to no more than we have heretofore set forth.

We repeat that the defendants, in an attempt to justify their excessive salaries, are relying upon an intangible. There is not one iota of evidence as to the extent that any of the Corporation's business was increased by the claimed inventions. The increase in profits was not at an unusual rate, yet the increases in salaries were at a most unusual rate (Ex. 18). In fact, the defendants' claim seems to be that the claimed inventions kept the Corporation's business from decreasing. If true, to what extent, we do not know.

With the record in this shape it cannot be seriously urged that the defendants have met the burden of proof. They certainly have not met the burden of proof to the extent of justifying outrageously excessive salaries. We repeat, the urging of the so-called inventions as a justification was an afterthought.

4.

DEFENDANTS' SALARIES WERE PART OF A CONSPIRACY ON THE PART OF DEFENDANTS TO FRAUDULENTLY ENRICH THEMSELVES AT THE EXPENSE OF PLAINTIFF, THE MINORITY STOCKHOLDER.

The *bete noir* of this entire picture was the defendant Miller. Prior to the entreé of Miller, and under the guidance of Ballagh and Patterson, the Corporation had been paying salaries to Ballagh and Patterson at least to the extent that the law would allow. In numerous instances, in excess thereof. Miller, as heretofore pointed out, brought about three changes each working to plaintiff's detriment, namely, (1) the nonpayment of dividends; (2) the repudiation of the Corporation's obligation to pay plaintiff royalties as required by contract; and (3) the increase of salaries. These three changes were inaugurated at or about the same time. They had an only too apparent result—they enriched the defendants at the expense of the minority stockholder. Previously, dividends were paid by the Corporation. We venture, they would have continued to be paid except for the appearance of Miller. Royalties had always been paid. Both plaintiff's dividends and royalties had been in substantial amounts (Ex. 18).

Plaintiff could not, and still cannot, force the Corporation to pay dividends. It can, however, force the Corporation to continue the payment of royalties. This it is doing. There is now being appealed to this Court a case wherein Byron Jackson Co. sued the Corporation (Patterson-Ballagh Corporation) and in which Mr. Judge Hollzer, in the trial court, decided that the

plaintiff herein was entitled to royalties, and a judgment for royalties has been rendered in favor of plaintiff. Plaintiff should likewise be able to force the defendants to restore to the Corporation salaries paid to themselves to the extent of their excessiveness. If the holding of this Court is to the contrary, defendants will be given *carte blanche* to continue to bleed the Corporation to their own advantage and plaintiff might just as well write off to profit and loss its entire investment in the Corporation.

The repayment of the excess of salaries would not be disastrous to the defendants. The Corporation would be the recipient and defendants own a three-quarter interest therein. Failure to make restitution, however, would be the end of plaintiff's investment.

The universal law is that it is unlawful to distribute corporate profits in the guise of compensation. (*Wellington Bull & Co. v. Morris,* 230 N. Y. S. 122; *Green v. Felton,* 42 Ind. App. 675, 84 N. E. 166; *Carr v. Kimball,* 139 N. Y. S. 253; *Stratis v. Andreson,* 254 Mass. 536, 150 N. E. 832; *Barrett v. Smith,* 185 Minn. 596, 242 N. W. 392, pp. 393, 394; *Backus v. Finkelstein,* 23 Fed. (2d) 531, pp. 535, 537.)

To what extent the conspiracy of the defendants has succeeded can be shown no better than by the following compilation of figures, having to do with fiscal years, appearing upon Exhibit 18-D.

Distribution of Corporate Payments Between Byron Jackson Co. and Patterson, Ballagh, and Miller.

	BYRON JACKSON CO.			PATTERSON, BALLAGH AND MILLER[10]			
ear	Dividends	Royalties	Total	Salaries	Dividends	Royalties	Tota
28	$ 20,000	$ 7,793.00	$ 27,793.00	$ 16,857	$ 60,000	.....	$ 76,85
29	83,750	38,401.21	122,151.21	48,000	251,250	.....	299,25
30	13,750	22,204.88	35,954.88	45,750	41,250	.....	87,00
31		2,188.61	2,188.61	23,000		.....	23,00
32		1,502.50	1,502.50	3,750		$ 1,502.50[11]	5,25
33		1,642.12	1,642.12	3,375		1,642.12	5,01
34		3,216.89	3,216.89	12,000		3,216.89	15,21
35		3,809.76	3,809.76	13,500		3,809.76	17,30
36	1,500	5,657.68	7,157.68	32,500	4,500	5,657.68	42,65
37		5,890.20	5,890.20	27,000		5,890.20	32,89
38	1,500	5,759.27	7,259.27	25,000	4,500	5,759.27	35,25
39		3,340.49	3,340.49	28,000		3,340.49	31,34
40		.....	.....	48,417			48,41
41		.....	.....	53,667			53,66
otals	$120,500	$101,406.61	$221,906.61	$380,816	$361,500	$30,818.91	$773,13

It will be noted from the foregoing that in 1939 plaintiff received its last royalties (this was prior to July 1st). It will be noted that plaintiff received no dividends after 1938. It will be noted that in the years 1939, 1940, and 1941, the defendants took from the Corporation over $130,000,—this by way of salaries in which plaintiff could not share.

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[10]It will be recalled that in the early part of 1939; to-wit, on February 15, Patterson resigned as a director and President of the corporation and Miller thereupon took his place. All salary thereafter paid to the President of the corporation was paid to Miller.

[11]The royalty payments in this column arose by virtue of Exhibit 15-C. That contract provided that after plaintiff had received in royalties $75,000 under Exhibit 15-A plaintiff would assign to Patterson and Ballagh a one-half interest in the patents covered by Exhibit 15-A and a one-half interest in said agreement. This was done.

The picture presented would be bad enough if we were dealing with salaries paid to others than directors. It is unpardonable when the fiduciary relationship of directors to a minority stockholder enters. To establish fraud against directors the same degree of proof is not required as in the case of a stranger. (29 *Cal. Law Rev.* p. 190; *Wright v. Heublein,* 238 Fed. 321, 324; *Sagalyn v. Meekins, Packard & Wheat,* 290 Mass. 434, 195 N. E. 769, 771.)

The defendants have ridden roughshod over plaintiff's rights, and have constituted themselves trustees for themselves alone, and not for the minority stockholder. Their bad faith can be no better shown than by two illustrations in the record. Ballagh testified that the defendants did not consider their cash on hand adequate to pay dividends (R., 361); nevertheless, they raised their own salaries and in so doing took into consideration the fact that they were not paying dividends (R., 358; 363; 382). On June 27, 1939, at the time the conspiracy was formed, and just prior to the first salary increase which was approved by the board of directors on August 22, 1939, and made retroactive to March 1st of that year (Ballagh in the meantime having been drawing the increase), Miller wrote a letter to the Corporation which contained the following language:

> "Since assuming office as President of Patterson-Ballagh Corporation I have taken upon myself the duty of studying various costs in connection with the conduct of this business. I find that for the first six months of 1939 the corporation will show a loss of some $2,000." (R., 223.)

If Miller was sincere in his belief as to the loss of $2,000, and if he was sincere in his further statement appearing in the record that in making raises he considered the financial state of the business of the Corporation (R., 382), it was certainly a fine time for a salary increase.

Dated, September 10, 1943.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

From the minutes of the meeting of directors held October 1, 1936:

> "Upon motion of Mr. Patterson, seconded by Mr. Ballagh, the following resolution was adopted:
>
> RESOLVED: That the Board of Directors fix the salaries of C. L. Patterson, President, and J. C. Ballagh, Secretary-Treasurer, at $1250.00 each per month effective as of August 1, 1936, and $2,000.00 each per month effective as of September 1, 1936.
>
> "Mr. Patterson and Mr. Ballagh voted in the affirmative, and Mr. Dulin voted in the negative, on the foregoing Resolution.
>
> "Mr. Dulin stated that, in his opinion, the administrative costs were out of all proportion to the volume of business transacted by Patterson-Ballagh Corporation, Ltd." (R., 113.)

From the minutes of the meeting of stockholders held on January 29, 1937:

> "Upon motion duly made, seconded and carried, the following Resolution was unanimously adopted:
>
> BE IT RESOLVED, that each and every act of the directors of this corporation, and of each of the officers of this corporation, as shown by the records of this corporation, with the exception of the officers' salaries, and also with the exception of any acts of the officers expressly

disapproved by the Board of Directors of this corporation, be and the same are hereby ratified, adopted, approved and confirmed, as and for the acts of this corporation.

"Upon motion duly made and seconded the following Resolution was adopted:

BE IT RESOLVED, that the salaries prevailing for the past year of the two executive officers are hereby approved.

"Mr. Patterson and Mr. Ballagh voted in the affirmative, and Mr. Dulin voted in the negative, on the foregoing resolution.

"Mr. Dulin stated that, in his opinion, from the preliminary financial statement rendered the company's financial condition has not allowed the administrative salaries being paid which, in his opinion, are excessive, and further, the dividends declared during the year should not have been paid. Taking into consideration the condition of the business, the volume of sales, as a director and a stockholder, he urged that the administrative salaries be adjusted downward and that no further dividends be paid until the company is in a greatly improved financial position." (R., 124.)

From the minutes of the meeting of directors held on October 13, 1938:

"The next matter before the meeting was the matter of the increase in the officers' salaries. A general discussion was had and it was moved by Mr. Dulin, seconded by Mr. Elliott, that the salary of Mr. C. L. Patterson, President, be in-

creased to $1500.00 per month, effective September 1, 1938. Motion unanimously carried. It was thereupon moved by Mr. Dulin, seconded by Mr. Elliott, that the salary of Mr. J. C. Ballagh, Secretary-Treasurer of the company, be increased to $1500.00 per month, effective September 1, 1938. Motion unanimously carried." (R., 182.)

From the minutes of the meeting of the directors held on January 27, 1939:

"On motion of Mr. Dulin, seconded by Mr. Ballagh, and unanimously passed, the following resolutions were adopted:

RESOLVED, that the officers' salaries, viz. Mr. Patterson and Mr. Ballagh, be each One Thousand ($1,000.00) Dollars per month, effective January 1, 1939." (R., 203.)

From the minutes of the meeting of the directors held on February 15, 1939:

"COMPENSATION
OF PRESIDENT

The meeting then proceeded with the matter of considering the compensation to be paid to the President for his services and the advisability of designating him as General Manager of the business and affairs of the corporation. The suggestion was made that such compensation be fixed in the same amount as had been paid the former President since the first of the current year.

"Thereupon, on motion of Director Ballagh, seconded by Director Dulin and unanimously carried, it was

RESOLVED, that the President of this corporation shall be the General Manager of its business and affairs and that he shall receive as compensation for his services commencing as of February 15, 1939, the sum of $1,000.00 a month, payable in the same manner and on the same dates as other executive salaries." (R., 213.)

From the minutes of the meeting of the directors held on August 22, 1939 (Dulin being absent):

"COMPENSATION
OF SECRETARY
AND TREASURER

The meeting then proceeded with a discussion of the amount of compensation being paid by the company to J. C. Ballagh as its Secretary and Treasurer, and the recommendation was made that his salary as such officer be increased to the extent of $4,000.00 per year as of March 1, 1939, on a basis whereby said increase would be paid in four equal quarterly installments commencing on June 1, 1939, and continuing until further order of the Board.

Thereupon, on motion of Director Armington, seconded by Director Miller and carried, Director Ballagh not voting thereon, it was

RESOLVED, that commencing as of March 1, 1939, the compensation being paid by this cor-

poration to J. C. Ballagh as its Secretary and Treasurer shall be and the same is hereby increased to the extent of $4,000.00 per year on a basis whereby such increase shall be paid in equal quarterly installments of $1,000.00 each, commencing on June 1, 1939, and continuing until further action of this Board." (R., 229.)

From the minutes of the meeting of the directors held on March 18, 1940:

"COMPENSATION
OF PRESIDENT

The meeting then proceeded with a discussion of the subject of increasing the compensation of the President to the extent of $500.00 a month, commencing as of the 1st day of March, 1940, at the suggestion of Director Ballagh. It was pointed out that under the administration of the President a number of economies had been effected and that the affairs of the corporation were being so operated as to materially enhance the net profit being derived from its activities, and further that the amount of earnings currently being experienced were more than sufficient to justify said increase. Director Dulin stated that he had no objection to making an increase in the compensation being paid to the President but expressed himself as feeling that the same should not be made for any definite period and with the understanding that it should not remain in effect beyond any reversal in the current trend of favorable business conditions.

"Thereupon, on motion, duly seconded and carried, Director Miller not voting thereon, it was

RESOLVED, that the compensation being paid by this corporation to De Mont G. Miller, its President, for his services as such, shall be and the same is hereby increased as of March 1, 1940, from the sum of $1,000.00 per month to the sum of $1,500.00 per month, to continue until further action of this Board of Directors and with the understanding that the same may be decreased in the event of the appearance of a reversal in the current trend of favorable business conditions.

"COMPENSATION OF SECRETARY-TREASURER

The President then suggested that the Directors consider the amount of compensation being paid by the corporation to Director Ballagh, as the Secretary-Treasurer thereof, and pointed out that his services in addition to those of said office also include those of a sales manager, in view of the fact that Director Ballagh was and had been for many years in complete charge of all sales activities of the corporation. The statement was made that during the last few months there had been sharp increase in the volume of sales and that the efforts devoted to the business of the corporation by Director Ballach had been showing very satisfactory results. The suggestion was made that the monthly compensation being paid Director Ballagh be increased to the

extent of $1,000.00 a month and that the quarterly compensation being paid to him remain the same. Director Dulin stated that he objected most strenuously to the suggested increase and expressed himself as feeling that the same was entirely unwarranted and should not be put into effect under any conditions until the corporation was paying satisfactory dividends to its shareholders.

"Thereupon, on motion of Director Miller, seconded by Director Burrell and carried, Director Dulin voting in the negative and Director Ballagh not voting thereon, it was

RESOLVED, that the monthly compensation being paid by this corporation to J. C. Ballagh, its Secretary and Treasurer, for his services as such and in the supervision of the sales activities of this corporation, shall be and the same is hereby increased as of March 1, 1940, from the sum of $1,000.00 per month to the sum of $2,000.00 per month, to continue until further action of this Board of Directors and with the understanding that the same may be decreased in the event of the appearance of a reversal in the current trend of favorable business conditions;

FURTHER RESOLVED, that the quarterly compensation being paid by this corporation to J. C. Ballagh, its Secretary and Treasurer, for his services as such and in the supervision of the sales activities of this corporation in the amount of $1,000.00 a quarter shall remain the same and shall not be deemed to have been

changed or modified by the foregoing resolutions." (R., 242.)

From the minutes of the meeting of the directors held on November 29, 1940 (Dulin not present):

"ADDITIONAL
COMPENSATION
TO J. C.
BALLAGH

The President then suggested that the Directors consider the payment of additional compensation for the current fiscal year to Director Ballagh, and pointed out that he had been serving as the Secretary and Treasurer as well as the Sales Manager of the company and that due to his efforts the company had been enjoying an exceptionally fine volume of business and that its earnings were being materially increased, with excellent prospects for a further increase during the next fiscal year. Director Armington suggested that Director Ballagh be paid additional compensation for his services during the current fiscal year in an amount equivalent to one-sixth of his regular compensation paid or payable to him by the company for said year.

"Thereupon, on motion of Director Armington, seconded by Director Burrell and carried, Director Ballagh not voting thereon, it was

RESOLVED, that the proper officers of this corporation shall be and they are hereby authorized and directed to pay to J. C. Ballagh as additional compensation for his services

rendered to the company during the fiscal year ending on November 30, 1940, a sum equivalent to one-sixth of his regular compensation paid or payable to him by his corporation for his services during the current fiscal year.

"Additional Compensation to D. G. Miller

The subject of paying additional compensation to Director Miller, the President of the corporation, was then brought up for discussion and the extent and value of his services rendered during the current fiscal year were reviewed in detail. After a consideration of said services the suggestion was made that he should be additionally compensated by the company therefor to the same extent as other executives in that his services were of a comparable value.

"Thereupon, on motion of Director Ballagh, seconded by Director Armington and carried, Director Miller not voting thereon, it was

Resolved, that the proper officers of this corporation shall be and they are hereby authorized and directed to pay to D. G. Miller as additional compensation for his services rendered to the company during the fiscal year ending on November 30, 1940, a sum equivalent to one-sixth of his regular compensation paid or payable to him by this corporation for his services during the current fiscal year." (R., 251.)

From the minutes of the stockholders' meeting held on January 21, 1941:

"RATIFICATION
OF PRIOR ACTS
OF OFFICERS
AND DIRECTORS

Thereupon, on motion of J. C. Ballagh, seconded by D. G. Miller and carried, E. S. Dulin voting in the negative, it was

RESOLVED, that all action taken by the Board of Directors of this corporation since the date of the last annual meeting of the shareholders, whether said Directors were de facto or de jure, and all action of the officers of this corporation done pursuant to the authorization of the Board of Directors or with the knowledge and acquiescence of the Directors are hereby ratified, approved and confirmed as and for the corporate acts of this corporation.

"E. S. Dulin explained his vote in the negative on the foregoing resolution by stating that in his opinion the acts of the officers and Directors in accepting and fixing the amount of compensation paid during the last fiscal year to the President and Secretary was contrary to the best interests of the minority shareholders." (R., 264.)